Supreme Court, U. S.
FILED
FEB 6 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

No. 79-1055

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

UNITED GAS PIPE LINE COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT UNITED GAS PIPE LINE COMPANY IN OPPOSITION

IRVING JACOB GOLUB
STEPHEN A. WAKEFIELD
CECIL W. TALLEY
W. CASEY WREN
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1246

February 6, 1980

Bowne of Houston, Inc. Printed in U.S.A.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

No. 79-1055

FEDERAL ENERGY REGULATORY COMMISSION,

Petitioner,

v.

UNITED GAS PIPE LINE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT UNITED GAS PIPE LINE COMPANY IN OPPOSITION

OPINIONS BELOW AND JURISDICTION

The opinions below are correctly referenced and the basis of this Court's jurisdiction is adequately described in the petition for a writ of certiorari.

QUESTION PRESENTED

Whether the Commission[1] arbitrarily, retroactively and without supporting evidence imposed a new standard establishing a presumption of extravagance in order to eliminate from the rate base of United Gas Pipe Line Company (United) certain advance payments made under contractual arrangements entered prior to the announcement of that presumption.

STATUTE AND REGULATION INVOLVED

The petition for a writ of certiorari raises questions involving Sections 4(a) and (e) of the Natural Gas Act (15 USC §§ 717(a) and (e)) and Commission Order No. 465, 48 FPC 1550 (1972), *reh. denied,* 49 FPC 517 (1973). The statutory language is accurately set forth in the petition for a writ of certiorari. The copy of Order No. 465 referenced in the petition for a writ of certiorari is an accurate copy of that order.

STATEMENT

The issues in this case arise out of the Commission's advance payments program. The advance payments program was created by the Commission in 1970[2] as an experiment designed to augment the supplies of gas available to

[1] Pursuant to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977), 42 U.S.C.A. §§ 7101, *et seq.* (Supp. 1977), and Executive Order No. 12,009, 42 Fed. Reg. 46,267 (1977), on October 1, 1977 the Federal Power Commission (FPC) ceased to exist and most of its regulatory responsibilities, including those under Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, were transferred to the Federal Energy Regulatory Commission (FERC). Accordingly, as used herein, the term "Commission" means the FPC when referring to actions taken prior to October 1, 1977 and means the FERC when referring to actions taken on or after October 1, 1977.

[2] *Accounting and Rate Treatment of Advance Payments to Suppliers for Gas and Amending FPC Form No. 2,* FPC Order No. 410, 44 F.P.C. 1142 (1970).

the interstate market. Under the program, pipeline companies provided interest-free advances of cash to producers for use by the producers in exploring for, developing and producing natural gas reserves for commitment to the interstate market. To encourage pipeline companies to make these interest-free advances and to offset partially the costs of making such advances, the Commission authorized pipeline companies to include the advance payments in their rate base.

The Commission instituted the advance payments program through a series of orders which periodically modified and extended the program.[3] Under these orders, the Commission periodically changed the specific conditions under

[3] *Accounting and Rate Treatment of Advance Payments to Suppliers for Gas and Amending F.P.C. Form No. 2,* FPC Order No. 410, 44 FPC 1142 (1970); *Accounting and Rate Treatment of Advance Payments to Suppliers for Gas and Amending F.P.C. Form No. 2,* FPC Order No. 410-A, 45 FPC 135 (1971); *Accounting and Rate Treatment of Advance Payments to Suppliers for Exploration and Lease Acquisition of Gas Producing Properties,* FPC Order No. 441, 46 FPC 1178 (1971), *reh. denied,* 47 FPC 57 (1972); *Accounting and Rate Treatment of Advance Payments Included in Account 166, Advance Payments for Gas Development and Production,* FPC Order No. 465, 48 FPC 1550 (1972), *reh. denied,* 49 FPC 517 (1973); *Accounting and Rate Treatment of Advances Included in Account No. 166, Advances for Gas Exploration, Development and Production,* FPC Order No. 499, 50 FPC 2111 (1973), *reh. denied,* 51 FPC 818 (1974); *Accounting and Rate Treatment of Advances Included in Account 166, Advances for Gas Exploration, Development and Production,* FPC Order No. 529 (June 17, 1975), *reh. denied,* FPC Order No. 529-A (August 15, 1975); *Accounting and Rate Treatment of Advances Including in Account No. 166, Advances for Gas Exploration, Development and Production,* Docket Nos. R-411 and RM74-4 (Order on Remand from Court Opinion Terminating Investigation and Terminating Advance Payment Program with Conditions) (December 31, 1975). Commission Order Nos. 410, 410-A and 441 were affirmed *sub nom. Public Service Comm'n of New York* v. *FPC,* 467 F.2d 361 (D.C. Cir. 1972); Commission Order Nos. 465 and 499 were remanded *sub nom. Public Service Comm'n of New York* v. *FPC,* 511 F.2d 338 (D.C. Cir. 1975) (hereinafter *New York Commission II*).

which an interstate gas pipeline could make advance payments qualifying for rate base treatment.[4] In each instance in which the Commission added new conditions to the advance payment program, the Commission order explicitly stated that the changes were applicable only to advance payment agreements made after the new requirement was promulgated.

Prior to December 28, 1973, the Commission had given no indication that a relationship existed between a pipeline's inclusion of an advance payment in its rate base and the expenditure of that advance by the recipient producer. On that date, the Commission issued Order No. 499, in which it stated that "as a general policy" the Commission would not permit pipeline companies to include advance payments in their rate base unless the natural gas producer expended the advance "within a *reasonable* time from the date such amounts advanced are included in the pipeline's rate base." 50 FPC at 2115 (emphasis supplied). On rehearing of Order No. 499, the Commission rejected the pipelines' requests for specific guidelines as to what is a "reasonable time", stating:

> "we believe it is appropriate to set no rigid standards for review of such advances, but rather to examine each advance on a case by case basis." 51 FPC at 819.

[4] For example, Order No. 441 added a requirement that the advance be repaid even if production was not obtained (under prior orders advance payments could be repayable only if, and to the extent that, gas was found and produced); Order No. 465 required, for the first time, that advances be removed from rate base at the end of five years if deliveries had not commenced or if gas developed with the advance was sold to another company; and Order No. 529 added requirements that (1) the pipeline making the advance receive a first call on gas produced; (2) such gas be committed to the pipeline under a long term contract; (3) the producer agree to accept a just and reasonable rate as established by the Commission; and (4) pipelines pay interest on amounts which must be refunded if the gas is sold to another company.

The D.C. Circuit on review of Order No. 499 characterized the announcement of this timing policy as "the only limitation" added by that order. *New York Pub. Serv. Comm'n* v. *FPC*, 511 F.2d at 344.

The circumstances existing at the time United made its advance payment agreements have never been in dispute. Specifically, it is undisputed that (1) United was forced by supply shortages to curtail deliveries to its customers and therefore needed additional gas supplies; (2) from the inception of the advance payment program advance payments were the *sine qua non* for commitment of significant new supplies; and (3) virtually all advance payments being made at the time were "front-end" advances, *i.e.*, advances made prior to expenditure by the producer.

United made the advance payments at issue in this case during 1973, while Order No. 465 was in effect.[5] Pursuant to that order, United included the amounts advanced in its rate base in general rate increase filings made under Section 4 of the Natural Gas Act on September 21, 1973 and April 15, 1974. These two rate filings, which the Commission assigned Docket Nos. RP74-20 and RP74-83 respectively, were consolidated for purposes of hearing and decision. Settlement negotiations in the consolidated docket ultimately resulted in a Stipulation and Agreement dated August 1, 1975 (hereinafter referred to as the "Settlement Agreement"). Evidentiary hearings on the Settlement Agreement, including the treatment of advance payments thereunder, were held before an Administrative

[5] A small amount attributable to advance payment agreements made under Order No. 499 was also involved in the case before the Fifth Circuit below; however, the Commission has not petitioned for a writ of certiorari with respect to the Fifth Circuit's treatment of those agreements. Advance payments executed during the existence of both Order No. 465 and Order No. 499 have also been included in rate base in subsequent rate filings.

Law Judge of the Commission on December 2, 1975. The Settlement Agreement and hearing record were then certified to the Commission on December 24, 1975. On July 29, 1977, the Commission issued Opinion No. 815. (Petition for Writ, 44a – 72a). Those modifications included, among other things, denial of rate base treatment for $23,380,650 of advance payments on the grounds that such amounts had not been expended by the *producer* within thirty days of inclusion in United's rate base and resulting rate.[6] The Commission contended that advance payments made more than 30 days prior to expenditure by the producer were "presumptively extravagant." (Petition for Writ, 60a). Neither the Commission nor its Staff ever contended that United could actually have obtained gas commitments if it had restricted its advances to amounts to be spent by the producer within 30 days and indeed, in Opinion No. 815-A, the Commission expressly disclaimed any suggestion that United had acted unwisely in making front end advances. "We do *not* find that, as a matter of business acumen, United was unwise to enter into advance payment agreements". (Petition for Writ, 32a) (emphasis in original).

Pursuant to Section 19 of the Natural Gas Act, United sought rehearing of Opinion No. 815 and, when rehearing was denied in Opinion No. 815-A (Petition for Writ, 25a – 43a), filed its petition for review in the United States Court of Appeals for the Fifth Circuit.

In a decision issued on June 22, 1979 (Petition for Writ, 1a – 20a), the court below reversed Opinion Nos. 815 and 815-A with respect to the treatment of United's advance payments governed by Order No. 465 and reversed and remanded Opinion Nos. 815 and 815-A with respect to the treatment of those advance payments governed by Order

[6] There was no dispute that the amounts had, in fact, been advanced by United to the producers prior to inclusion in United's rate base.

No. 499. The Fifth Circuit decision explains that, particularly for those payments subject to Order No. 465, the application of the Commission's 30-day "presumption" would arbitrarily impose a new and previously unannounced dimension and restraint governing permissible advance payments. (Petition for Writ, 13a). The court found that none of the Commission advance payment orders between 1970 and 1973 had "specified a concrete timing relationship between pipeline's advance and producer's expenditures," (Petition for Writ, 12a) and pointed out that when — in Order No. 499 — the Commission did announce a policy to require a temporal relationship between the pipeline's advance and the producer's expenditure, it provided only that the advance should be expended "within a reasonable time after their inclusion in rate base." (Petition for Writ, 13a). The court noted that the Commission did not announce its 30-day line-of-credit requirement until Opinion No. 769 was issued in July 1976[7], more than three years after the advance payments in issue were made, and concluded that "the law will not tolerate this sort of after-the-fact, in fact retroactive, imposition of standards" (Petition for Writ, 14a) to advance payments made years earlier, and indeed prior to announcement of even the "reasonable time" policy of Order No. 499. The court found that there was "simply no evidence either to support or justify the presumption of extravagance for these non-thirty day advances." (Petition for Writ, 14a). The Fifth Circuit denied rehearing of its decision on August 8, 1979. (Petition for Writ, 23a, 24a).

[7] *Tennessee Gas Pipeline Co.*, Opinion No. 769, 55 FPC .... (July 9, 1976), *reh. denied*, Opinion No. 769-A, 56 FPC .... (May 31, 1977), remanded *sub nom. Tennessee Gas Pipeline Company, et al* v. *FERC*, 606 F.2d 1094 (D.C. Cir. 1979), *cert. filed*, December 19, 1979 (No. 79-962) (hereinafter cited as "*Tennessee*").

ARGUMENT

The Commission has failed to state a basis for certiorari in this case. Although the Commission asserts that the decision of the Fifth Circuit in this case is in conflict with the decision of the D.C. Circuit in *Tennessee,* it acknowledges that the alleged conflict over the interpretation of an expired program does not merit review by this Court.[8] (Petition for Writ, 9-10). We agree.

The only theory the Commission advances in support of its petition for certiorari is that if the Court grants certiorari in *Tennessee* — which the Commission opposes — then it should grant certiorari in this case so that the treatment of pipelines may be "uniform". This claimed need for uniformity is pure makeweight[9] and is, in fact, contrary to

---

[8] In fact the alleged differences between the decisions of the courts in *United* and *Tennessee* are more apparent than real. Both courts unequivocally rejected the Commission's attempt to impose a 30-day line-of-credit test on advance payments made under either Order No. 465 or Order No. 499. [The Seventh Circuit had previously rejected the 30-day line-of-credit test in a case involving solely Order 499 advances. *Natural Gas Pipeline Company of America* v. *FERC*, 590 F.2d 664 (7th Cir. 1979).] In *United,* the Fifth Circuit held that the law would not tolerate retroactive application of the 30-day line-of-credit test to United's Order No. 465 advances and found that "there was simply no evidence either to support or justify the presumption of extravagance" for these advances. Accordingly, the Court reversed with respect to those agreements. In *Tennessee,* the D.C. Circuit similarly held that application of the 30-day line-of-credit test to Tennessee's advances was unlawful but remanded the case "for a more extensive and flexible inquiry by the Commission into the reasonableness of attempts to protect the rate payers from excessive costs." *Tennessee, supra.* (606 F.2d at 1118-9).

[9] Were the Commission contending that the results in *United* and *Tennessee* were identical and that parallel grant or denial of certiorari was required to preserve that uniformity, the Commission's theory would appear more rational. But here, although the Commission alleges that the decision of the courts below are in conflict, the Commission is urging that both of the decisions below should be allowed to stand.

the Commission's long-standing position that advance payments must be reviewed on a case-by-case basis. This position was reiterated by the Commission in its decision below when it stated:

> "We have consistently indicated that the rate treatment for advance payments will be decided on a case-by-case basis." (Petition for Writ, 30a).

Significantly, the Commission contends that the differences between the decision of the courts in *United* and *Tennessee* are not sufficiently important to require action of this Court to provide "uniformity". Since any decision of this Court on the merits in *Tennessee* can only reduce or maintain, not increase, those differences, it is clear that grant of the petition for certiorari in Tennessee could not be an adequate reason to grant certiorari in this case.[10]

---

[10] The D.C. Circuit has reversed the Commission in *Tennessee,* as did the court below. While affirmance of the Commission in *Tennessee* might, *arguendo,* create a conflict between circuits, no one appears to be urging that the D.C. Circuit be reversed and the Commission affirmed. If certiorari is granted in *Tennessee* and the petitioner's position therein adopted, the opinions of the circuits will be parallel. On the other hand, should the opinion of the D.C. Circuit not be modified, further proceedings by the Commission will be required. The existence of a conflict before the conclusion of these subsequent Commission proceedings is purely conjectural.

CONCLUSION

For the foregoing reasons, United respectfully submits that there is no basis for this Court to consider the decision of the Fifth Circuit in the proceedings below, and that the Court should deny the Commission's contingent petition for certiorari.

Respectfully submitted,

IRVING JACOB GOLUB
STEPHEN A. WAKEFIELD
CECIL W. TALLEY
W. CASEY WREN
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1246

Counsel for
United Gas Pipe Line Company

February 6, 1980